IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 367

UNITED STATES OF AMERICA,

Appellant,

v.

CONTINENTAL CAN COMPANY, INC. and HAZEL-ATLAS GLASS COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTIONS TO DISMISS OR AFFIRM.

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Appellee, Continental Can Company, Inc., pursuant to Rule 16 of the Revised Rules of this Court, moves 1) that the appeal be dismissed because not taken in conformity with the Rules of this Court, or in the alternative 2) that the final judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement.

This is a direct appeal from the judgment of the district court holding that the acquisition of Hazel-Atlas Glass Company (Hazel-Atlas) by Continental Can Company, Inc.

(Continental) did not violate Section 7 of the Clayton Act, 15 U. S. C. 18.

The government's complaint was dismissed by the district court because of a failure of proof of either actual anti-competitive effects flowing from the acquisition or reasonable probability that the forbidden anti-competitive effects would result in the future.

The district court rendered an opinion in which it made meticulous findings of fact and carefully and correctly applied the law, including *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962), which was decided by this Court after the completion of the government's case but before the district court filed its opinion and order.

It is appellee's position that the appeal should be dismissed because, contrary to the Rules of this Court, the government's Jurisdictional Statement is based in substantial and material part upon material which, although referred to in the Jurisdictional Statement as part of the record, is not a part of the record and was not offered or received in evidence.

It is, further, appellee's position that the judgment of the district court is clearly correct, that it is fully supported by the evidence of record and the decisions of this Court and that no substantial question of law is presented by the appeal.

Appellee therefore moves that the appeal be dismissed, or, in the alternative, that the judgment below be affirmed without further briefing or oral argument.

The Acquisition

Continental acquired all of the assets and assumed all of the liabilities of Hazel-Atlas on September 13, 1956. Since that date the acquired business has been operated by Continental. Hazel-Atlas was dissolved late in 1956.

Prior to the acquisition, Continental's principal business was the manufacture and sale of metal cans and other metal containers. Other products included paper cups and plates, fibre drums, kraft linerboard, flexible packaging materials, crown caps, vacuum type metal caps, plastic containers and can closing machinery. It did not manufacture or sell any glass products or other product manufactured or sold by Hazel-Atlas (App. 13a).[1]

Continental was formed in 1913. In common with many American corporations it grew over the years by both internal growth and outside acquisitions.

The district court considered the evidence relating to prior acquisitions and found:

> "Many of the acquisitions were made a number of years ago in the 1920's and the 1930's. Many were extremely small. Some were the result of liquidation sales. Some appear to have been cleared with the Department of Justice or to have had its tacit approval. Some were located in Canada. Some of the companies acquired were subsequently sold.
>
> "None of the companies acquired in the ten years prior to suit were can companies. No glass company had ever been acquired before" (App. 43a).

The government does not challenge these findings.[2]

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[1] References to the district court's opinion are to the Appendix to the Jurisdictional Statement. To avoid confusion the appendices to these motions are designated Appellee's Appendix 1 and Appellee's Appendix 2. The government's Jurisdictional Statement is referred to herein by the abbreviation "J. S.".

[2] In its Jurisdictional Statement the government refers to the acquisition of White Cap Company and states that in 1958 it had "approximately 60% of the production and shipment of all vacuum closures made from tin plate" (J. S. 5, n. 3). The reason for including this statement in the Jurisdictional Statement is not clear; in any event it is meaningless unless considered in connection with the structure of the industry of which metal vacuum closures are a part. The government has excluded this subject from the appeal (J. S. 6, n. 6).

Hazel-Atlas was a company manufacturing and selling glass containers both for home and commercial use, glassware, including tumblers, tableware and kitchenware, some types of metal closures for glass containers and miscellaneous items. It did not manufacture or sell metal containers or any other product made or sold by Continental (App. 13a).

The Proceedings Below

When the proposed acquisition was announced in the summer of 1956, the government attempted to stop it by invoking an existing decree to which Continental was a party. When the district court which had entered that decree held that it did not apply to the proposed acquisition,[3] the government obtained the voluntary agreement of the companies to postpone the acquisition until the government could apply for a temporary restraining order. Shortly thereafter a complaint charging violation of Section 7 of the Clayton Act was filed in the District Court for the Southern District of New York, and application was made by the government for a temporary restraining order. This application was denied on September 13, 1956, and thereupon the acquisition was completed.

The action was continued as an action for divestiture. Extensive pretrial proceedings, involving both elaborate discovery and pretrial conferences, were conducted and the government presented its case in a trial lasting six weeks. During the trial the government called numerous witnesses, took over 4,000 pages of testimony and introduced hundreds of exhibits, among which were elaborate statistical computations. With very few exceptions everything the government offered was admitted in evi-

[3] *United States* v. *Continental Can Company*, 143 F. Supp. 787 (N. D. Cal. 1956).

dence. The government does not complain of the exclusion of the few items offered which were not admitted.

On the conclusion of the government's case Continental moved for a dismissal of the complaint under Rule 41(b) of the Federal Rules of Civil Procedure.

The district court, correctly applying Rule 41(b), proceeded to evaluate the evidence to determine whether on the facts presented the government was entitled to relief. Finding that it was not, the court orally announced its decision to dismiss the complaint.

This Court decided *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962) before the district court completed the preparation of its written opinion, findings of fact and conclusions of law. Very shortly after the *Brown Shoe* decision was rendered, the government requested and received permission to file with the district court an additional brief discussing the applicability of *Brown Shoe*. This was done and appellee responded. Judgment dismissing the complaint was entered on April 16, 1963.

The district court's opinion covers 95 printed pages. Each of the government's contentions is carefully analyzed and comprehensive findings are made with the greatest of care. Scrupulous attention is given to the teachings of *Brown Shoe* and other relevant decisions of this Court.

The district court found no fault with the legal theories advanced by the government. It based its conclusions squarely on the finding that the evidence showed no actual anti-competitive effects from the acquisition and showed nothing from which it could be concluded that there was a reasonable probability that the forbidden anti-competitive effects would develop in the future. The complaint, in short, was dismissed because the government failed to support its allegations with proof.

Argument—Motion to Dismiss Appeal.

Rule 13 of the Revised Rules of this Court provides that upon filing in this Court of the record brought up by appeal, the appellant shall file a statement as to jurisdiction, which shall comply in all respects with Rule 15.

Rule 15 provides that the Jurisdictional Statement shall contain: "a concise statement of the case containing the facts material to the consideration of the questions presented."

It is implicit that the statement of facts shall be a fair statement based on the record.

The government's Jurisdictional Statement is based in substantial part on material which, although referred to in the Jurisdictional Statement as exhibits, was neither offered nor received in evidence.

The first item in question is referred to in the Jurisdictional Statement as "GX 636". No such exhibit was offered or received in evidence. The government at page 15 of its Jurisdictional Statement quotes from "GX 636" at length. The same reference is cited at pages 14 and 23 of the Jurisdictional Statement.

On page 18 of its Jurisdictional Statement, the government cites material which it refers to as "GX 415A". The reference is later repeated on the same page. No such exhibit was offered or received in evidence.

On page 18, also, of its Jurisdictional Statement the government cites material which it refers to as "GX 418" and "GX 421". No such exhibits were offered or received in evidence.

On page 19 of its Jurisdictional Statement, the government cites material which it refers to as "GX 774". No such exhibit was offered or received in evidence.

On page 19, also, of its Jurisdictional Statement the government cites as a group "GX 1-131". Out of this group the following were neither offered nor received in evidence:

GX 4	GX 19
GX 5	GX 20
GX 6	GX 21
GX 7	GX 22
GX 8	GX 23
GX 9	GX 25
GX 10	GX 26
GX 11	GX 27
GX 12	GX 28
GX 13	GX 29
GX 15	GX 30
GX 17	GX 32
GX 18	GX 41

All of the above material was material which was assigned identification numbers before the trial. After the appellee—the defendant below—advised the government that it would object to such material as unreliable, the government chose not to subject it to the test of admissibility, and it was not offered. The government should not now be heard to rely on material which it did not offer at the trial.

On page 17 of its Jurisdictional Statement the government cites material which it refers to as "GX 414". The reference is to a document which was offered at the trial and excluded (Tr. 3553-3554).

The Jurisdictional Statement, being based upon and replete with references to material which is not in the record, is not in accordance with the Rules of this Court and should be rejected. Accordingly, the motion to dismiss the appeal should be granted.

Argument—Motion to Affirm.

The Government's Questions

The first question which the government raises on its appeal: "whether mergers eliminating 'interindustry' competition are subject to Section 7 of the Clayton Act" is fictitious. Appellee never contended below, and the district court did not hold, that mergers eliminating interindustry competition were not subject to Section 7. The district court held that the existence of such competition "is not *determinative* of the metes and bounds of a relevant product market" (App. 36a; emphasis added), and that lines of commerce in a Section 7 case must be defined by applying the various criteria established by the decisions of this Court and recently synthesized in *Brown Shoe*. It thereupon proceeded to apply those criteria to the facts and found that metal cans and glass containers together did not constitute a single line of commerce (App. 36a-37a). In making this factual assessment, the court below pointed out that the government had failed to distinguish "between inter-industry or overall commodity competition and the type of competition between products with reasonable interchangeability of use and cross-elasticity of demand which has Clayton Act significance" (App. 37a).

But the court did not stop there. It went on to consider whether the prohibited anticompetitive effects (actual or probable) had been shown in this market setting of interindustry competition. It specifically recognized that conglomerate mergers (*i.e.*, mergers of companies engaged in different industries) are covered by the statute where such effects are shown (App. 40a). Here no such effects were shown. This case, therefore, does not present the issue posed by the first question.

The second question which the government raises: "whether, in order to prove that a merger may substantially lessen competition, the government must in every case use statistical evidence of market shares in a defined product market" is equally fictitious. Appellee never contended below, and the district court did not hold, that the use of statistical evidence of market shares was a necessary requirement. It was the government that elected to try its case on the basis of statistical, and virtually no other, evidence. It was the government that tried to define, by statistics, an unknown product line. And it was the district court that tried, and tried hard, to use the statistics presented to it. As will be shown, *infra*, the government's statistics were no good, and even on this appeal the government is forced to abandon the statistics that it offered below in support of its claimed canning line of commerce and fall back on more general statistics which, in turn, are thoroughly unreliable. Confronted with this confusing hodgepodge of statistics, the district court nevertheless gave them the benefit of every doubt and adjudicated the issue of competitive effects on the basis of *all* the evidence in the case, making such use as it could of the government's statistics. Here again, this case does not present the issue posed by the government's question.

The only question in this case is the third posed by the government. It is strictly factual and plainly unsubstantial: "whether the district court erred in concluding that the government had failed to show that this merger would substantially lessen competition in the market for containers for food canning". This is simply an attempt by the government to substitute this Court for the trier of the facts. It presents no substantial question of which this Court should take cognizance. This Court should not be asked to retry a case that an experienced district judge

has tried with care and skill, and rendered a judgment that is clearly correct.

The situation here is comparable to that in *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949) in which this Court, in refusing to retry an anti-trust case, concluded at 340-41:

> "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

Lines of Commerce

Section 7 is applicable by its terms to substantial anti-competitive effects in "any line of commerce".

This Court has clearly recognized the necessity of delineating lines of commerce within which to measure the effects of a merger. In *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586 at 593 (1957), this Court observed:

> "determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected."

This statement was repeated in *Brown Shoe* (370 U. S. at 324), which also further elaborated on the criteria to be applied in defining the relevant product market or markets.

Notwithstanding the statute and the pronouncements of this Court, the government would reduce the product market inquiry—the critical threshold question in any Section 7 case—to a "customary" ritual (J. S. 11).

In defining the pertinent lines of commerce in this case, the district court scrupulously applied the tests established by the decisions of this Court and made detailed findings of fact fully supporting its market definitions.

The government originally proposed ten lines of commerce.[1] Each of these was considered in minute detail by the district court. It found that only three of them—glass containers, metal cans, and containers for beer—did, in fact, constitute separate lines of commerce.

That the district court clearly understood and properly applied the criteria specified by this Court for determining lines of commerce and appraising competition between products, whether in the same industries or in different ones, is demonstrated by its findings with respect to beer containers. Here the district court evaluated the evidence and found that a *prima facie* showing had been made that glass containers for beer and metal containers for beer constituted a single line of commerce notwithstanding the fact that they were made and sold by different industries. This finding was based on evidence which the district court considered to show "virtual interchangeability of use and cross-elasticity of demand between the two types of containers used for this purpose" [i.e., beer] (App. 66a). Having found such a line of commerce, the district court proceeded to evaluate the effect of the acquisition in it and

[1] 1. Containers for the canning industry. 2. Containers for the beer industry. 3. Containers for the soft drink industry. 4. Containers for the toiletries and cosmetics industry. 5. Containers for the medicine and health industry. 6. Containers for the household and chemical industry. 7. The can industry. 8. The glass container industry. 9. Metal closures. 10. The packaging industry.

found no reasonable probability that the acquisition would adversely affect competition in that line of commerce (App. 68a-70a). The district court's opinion plainly shows that the same methodology was followed with respect to every other line of commerce claimed by the government, including its alleged "interindr ry" lines, and, specifically, metal cans for food and glass containers for food.

It is perfectly apparent why the district court found that metal cans for food and glass containers for food, unlike metal and glass containers for beer, did not constitute a single line of commerce. Beer is beer. But one food product is not the same as another. Nor are their packaging needs the same. Sardines and mayonnaise are both food. But sardines traditionally move in metal cans, and the housewife traditionally buys mayonnaise in glass containers (DX-N). Or take the case of two varieties of a single food product—coffee. Ground coffee is packed 99% in metal cans and paper bags, and less than 1% in glass; whereas soluble (or instant) coffee is packaged 99% in glass and 1% in cans (App. 82a, n. 81). Then, again, consider the case of catsup. This food product is packed in glass for consumer usage and in cans for institutional usage (*ibid.*).

At the trial one of the *government's* expert witnesses estimated the extent to which various products are packaged in one type of container or another. His estimates, contained in DX-N, are reproduced herein as Appellee's Appendix 1 to this motion. They demonstrate that it would defy the realities of the market place to lump metal cans together with glass containers in a single food canning line of commerce. As the district court observed:

> "Choice of type of container in which to pack a particular product may be dictated by a variety of factors, including traditional or changing prefer-

ences of the buying public, eye appeal, the nature of the trade to be served, the physical characteristics of the product to be packed, the type of packing process required, distance to outlets, and other diverse factors" (App. 82a).

In rejecting the government's food canning line of commerce, the district court specifically found, after an exhaustive review of the evidence, that there was "no showing of reasonable interchangeability of use or cross-elasticity of demand as between metal and glass containers used for packing food" (App. 80a); that there was "no showing of any public or industry recognition of such a product market or sub-market" (App. 79a); that metal cans and glass containers do not have the same physical characteristics and uses in the food field (App. 80a); that "their shapes, sizes and other characteristics differ widely, depending upon the type of food to be packed in them" (*ibid.*); that "the manufacturing equipment and processes and the raw materials for each, far from being interchangeable, are entirely different" (App. 82a); that "the machinery used to pack food products in glass containers and the packing process are different from that used for packing in metal cans" (*ibid.*); that "there was no evidence to show that the thousands of packers of food products who purchase metal cans or glass containers, or both, fall into any categories of distinct classes of customers" (*ibid.*); that there was no evidence of "a distinct price structure for metal cans and glass containers used for food products, or of correlation or correspondence of prices between them" (*ibid.*); and that "there are no specialized vendors of containers used for food products" (App. 83a).

The district court, in short, went down the line of product market indicia outlined by this Court in *Brown Shoe*, and found the government's case deficient on each and

every score. One will read the Jurisdictional Statement in vain for any showing that these findings were incorrect, much less clearly erroneous (Rule 52(a)).

In addition to these findings negating the government's canning line of commerce, it should be noted that although Hazel-Atlas and Continental both sold their respective containers for food, they sold them for different uses.

The principal glass containers manufactured and sold by Hazel-Atlas for use as food containers were for use in packaging catsup, chili sauce, vinegar, syrup, salad dressing, jams, preserves, pickles, mayonnaise, maraschino cherries, olives and mustard (Tr. 879).

These products do not move in metal cans, except that a small amount of certain types of syrup is in cans. Catsup, chili sauce, salad dressing and mayonnaise in retail sizes are practically unknown in containers other than glass. The same is true of the other principal foods for which Hazel-Atlas sold glass containers—vinegar, jams, preserves, pickles, maraschino cherries and mustard (DX-N). Baby food containers, to which the government refers (J. S. 18), was a use for which Hazel-Atlas's participation was negligible.[5]

On the other side, the principal food products for which Continental sells its metal cans do not move in glass containers. Continental's largest food container lines are for fruits and vegetables, including juices (GX 880). Much of the fruit juice is packed concentrated in frozen form for which glass containers are not suitable. With respect to fruits and vegetables generally, cooking time, weight,

[5] The government's Jurisdictional Statement (J. S. 18) gives figures purporting to show the consumption of baby food containers and the division of such containers as between cans and glass containers. As a source of its figures the government cites a document which it refers to as "GX 415A." No such document was offered or received in evidence.

appearance and other market factors militate so heavily against glass containers that in practice only small amounts of premium grades are packed in glass containers (Tr. 766-69, 1112-13, 1124, QX 317, GX 318). In total, these are negligible (DX-N).

Other major food products for which Continental sells metal cans are evaporated milk, fish and seafood, coffee, meat and lard and shortening (GX 800). Here also, for a host of different reasons, some applying to one product and some to another, these products are, and continue to be, packaged in cans. Sometimes it is weight, often it is appearance and very frequently it is the very nature of the processing to which the product is subjected which determines that a metal container is the only practicable container to use.

In pretrial proceedings the government claimed that all packaging materials constitute a single line of commerce. This position was not pressed at the trial and has been abandoned. The interindustry competition to which it now refers, however, is by no means limited to glass containers and metal cans. Included also is competition of paper, plastics, and other packaging materials. Although the government is forced to recognize this in its Jurisdictional Statement (J. S. 11) it would now ignore everything except metal cans and glass containers.

The evidence on the question of whether metal cans and glass containers can be forced into the same product market can best be summarized in terms of the "practical indicia" referred to in *Brown Shoe*.[6]

Industry and public recognition

The can industry and the glass container industry are separate and well defined. Each has its own trade

[6] 370 U. S. at 325.

association and the Bureau of Census collects statistics relating to them separately (Tr. 1018, 2013, GX 800, pp. 5-21, GX 801, Table A, 2a-2f). The business world and the public recognizes them as separate industries and markets. There are no combined statistics available (Tr. 2941-42).

The product's peculiar characteristics and uses

Cans and glass containers are made of different materials and have different physical characteristics (App. 14a, 16a). While in some instances it may be physically possible to package products in either type of container, other forces, including tradition, weight, price, attractiveness and many others determine which container is customarily used (Tr. 665, 1080-81, 1116, 2111-12). This was graphically demonstrated by the estimates of the government's own expert (Tr. 2008, 2100-02, 2105-06A, DX-N).

Unique production facilities

Can and glass container manufacturing equipment is not interchangeable (DX-K, cover letter, p. 5). From the user's point of view it is not feasible to use a canning line designed for packing a product in cans to pack a product in glass containers or vice versa (Tr. 781, 1107, 1122-25).

Distinct customers

There was no evidence to show that purchasers of metal cans or glass containers, or both, fall into any categories of distinct classes of customers (App. 82a). The purchasers do not pack the same product in different containers (DX-N).

Distinct prices

Glass containers and cans are priced separately. The prices of cans are determined principally by the price of tinplate; those of glass containers principally by the cost of labor (Tr. 444, 484, 1002-03).

Sensitivity to price changes

Prices of one type of container are not changed in response to price movements of the other type (Tr. 444, 515, 733, 946, 964).[7] Manufacturers of one type of container frequently do not even know the price at which the other type of container is being sold (Tr. 946, 964). The record does not indicate that buyers shift their purchases from one type of container to the other because of changes in the price differential between the two.

Specialized vendors

Can manufacturing companies sell cans and glass container companies sell glass containers. Sales are normally made directly to users (Tr. 945). The evidence gives no hint of the existence of jobbers or wholesalers who sell both cans and glass containers, and the reason, of course, is that such persons could not be found.

Against this evidence the government still contends that cans and glass containers are somehow in the same product market. For this it relies primarily on studies made by a market study group within Continental of the possibility of putting certain food products which customarily move in glass containers into cans (J. S. 17-18).[8] The limited nature of such studies is shown by the gov-

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[7] The government's Jurisdictional Statement (J. S. 19) states that Hazel-Atlas considered the cost of metal containers in determining its own price. There is no such evidence in the record. In support of its statement the government cites (J. S. 19) a document which it refers to as "GX 774". No such document was offered or received in evidence.

[8] The government's Jurisdictional Statement (J. S. 18) also states that consideration was given by Continental to containers for wine and cites in support of that statement a document which it refers to as "GX 421". No such document was offered or received in evidence.

ernment's description of them. The government's own quotations from them (J. S. 17, n. 13) show that they were predicated on the development of cans which were not in existence. Many of them relate to experiments with aerosol containers. That they changed nothing in terms of market usage is clearly shown by DX-N. The few other documents referred to proved no more. Most of the Glass Container Manufacturers' Institute studies referred to on page 19 of the government's Jurisdictional Statement relate to beer containers, which the district court found to be a line of commerce, but one in which Hazel-Atlas' activities were almost non-existent (App. 65a, 68a). Most of the Can Manufacturers' Institute documents referred to on pages 19-20 of the government's Jurisdictional Statement relate to general research with respect to the use of cans. The district court properly found that this evidence did not show reasonable interchangeability or cross-elasticity of demand as between metal cans and glass containers generally.

Prior to the trial, also, the government proposed a "canning" line of commerce which it then defined as relating to containers for heat-sterilized and hermetically sealed foods. At the trial it limited this line to hermetically sealed foods, although some of the foods it claimed fell within this line were heat-sterilized but not hermetically sealed, some were hermetically sealed but not heat-sterilized, and some were neither.[9] See App. 77a, n. 79.

The government's confusion as to what it means to include within its "canning" line is complete. In its Pretrial Statement of proposed "Steps of Proof" it defined it as ". . . fruits, vegetables, juices and other foods which

[9] In its Jurisdictional Statement (J. S. 15-16) the government quotes extensively from an alleged exhibit which it refers to as "GX 636". No such exhibit was offered or received in evidence.

are heat-sterilized and hermetically sealed in cans and glass containers."

In oral argument on the motion to dismiss counsel for the government said (Tr. 4101): ". . . when we attempted to define this in our answer to interrogatories, we attempted to define it in this manner to explain what we were talking about and what we were trying to exclude, and the key thing is we were trying to include things which are hermetically sealed. We used the words 'heat sterilization' because we are trying to get away from frozen food." In response to questions from the district court, government counsel said that candy and baking powder in screw top containers (i.e., containers which are not hermetically sealed) would be included. The district court then said (Tr. 4109):

> "The Court: In other words, your contention now—I want to make sure I get this—your contention at the present time is that your line of commerce on food includes all foods that are packaged in tin or glass."

To this government counsel replied (*ibid.*):

> "That would be correct."

In an affidavit in support of a motion for reargument made just after the trial, government counsel said:

> ". . . our definition of the canning line included products which were not heat sterilized and in essence represented all foods which were put in hermetic containers." (McManus affidavit, Dec. 21, 1960, p. 3).

In the same affidavit (p. 5) government counsel said:

> "By its [the government's] direct examinations and by its documentary evidence it left no doubt

that the 'canning' line included non-heat sterilized foods."

The district court dealt with this confusion in its opinion. See App. 78a.

On this appeal the government has reversed its position again, and it now would limit the line to foods which are both hermetically sealed and heat-sterilized (J. S. 14-15).

On this appeal the government contends that one physical fact alone—the possibility of creating a hermetic seal on a container which can be heat-sterilized—is sufficient to create a line of commerce. It would ignore all other market factors which were shown at the trial to negative completely the existence of a line of commerce consisting of containers for canning.

A line of commerce consisting of containers for hermetically sealed and heat-sterilized foods is not known in everyday use and the evidence does not permit one to be discovered.[10] The government's two experts did not recognize such a line. The government's food expert testified that food processing for glass packing was different from that for metal can packing; that packing techniques for different types of containers were different; that packing economics were different; that the equipment required was different; and that the physical characteristics of the two types of containers produced different packing results (Tr. 765-70, 780-81A, 785-86). The government's other expert testified that specified products tend to move

[10] At page 11 of its Jurisdictional Statement the government states that it will be shown later in the Jurisdictional Statement that market shares of "containers for food canning" were proved. In the subsequent discussion referred to, however, the government admits (J. S. 22-23) that it has no figures to show market shares and attempts to create some by indulging in supposition and by using "GX 636", a document not offered in evidence.

in containers of one type or the other but not in both (Tr. 2100-02, 2105-06A, DX-N).

The government points to what it calls "the most graphic evidence of the interchangeability between glass and metal containers in the food canning market: numerous food products packed in both containers", and says that observations showed the same products offered for sale competitively in both glass and metal containers (J. S. 16).

The reference is to certain products purchased by FBI agents in retail stores. So far from showing that the products were offered for sale "competitively", it was stipulated at the trial (Tr. 2697-2701) that no attempt had been made to determine if the products were offered competitively. They are not the same products; they are not processed in the same way; and they are not priced competitively. A copy of the stipulation is annexed as Appellee's Appendix 2.

An examination of the government's examples of food products packed in both types of containers generally shows immediately what the differences were: green olives were packed in glass—ripe olives in cans; fruit preserves packed domestically were packed in glass containers—fruit preserves packed abroad and imported were packed in cans; tomato catsup in retail sizes was packed in glass containers—tomato catsup in institutional sizes was packed in cans.

Upon all of this evidence the district court found no reasonable interchangeability or cross-elasticity of demand as between cans and glass containers for packaging food. This finding was clearly correct.

Anti-Competitive Effects

The district court construed the words "may be", used in Section 7 in defining the ~~effect on competition~~ of mergers, as the equivalent of reasonable probability (App. 6a).

There is no doubt that this is correct. The Senate Report on the bill which became Section 7 says, with respect to the words "may be": "The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect." (S. Rep. No. 1775, 81st Cong. 2d Sess. 6; *Brown Shoe*, 370 U. S. at 323).

Although the present case was tried more than four years after the acquisition, there was no proof of actual anti-competitive effects. The government does not dispute this.

The inquiry then becomes one of the reasonable probability of the future development of anti-competitive effects where no such effects have developed in four years.

From the mere existence of interindustry competition in general in the sale of cans and glass containers, and the position of Continental and Hazel-Atlas in their respective industries, the government argues that an inference should be drawn that the effect of the acquisition may be substantially to lessen competition (J. S. 13). Here the government seizes upon half a sentence in *United States v. Philadelphia National Bank*[11] and tears it out of context.

The factual situation in *Philadelphia Bank* was completely different from that in the present case. There, both parties to the merger were direct competitors in the same line of commerce (commercial banking), so the merger was plainly a horizontal one. The merger would have produced a bank controlling an undue percentage of the relevant market and would have significantly increased the high degree of concentration that already prevailed in an industry which had witnessed a decline in the number of competitive units. It was in this context that the Court made its comments with respect to the inherent likelihood

[11] 374 U. S. 321, 365 (1963).

of the effects of that merger. There is no parallel whatever between the *Philadelphia Bank* case and the merger at issue here, which involves diversification by one company into a new product line.

In the present case the government contends that the interindustry competition was such as to make unavoidable an appraisal of the effects of the merger on this competition (J. S. 9). But that is precisely what the district court did. Although it found no single line of commerce comprising all metal cans and glass containers, and no line of commerce consisting of containers for canning, the district court proceeded to make a very careful and complete appraisal of the effect of the acquisition in every direction. Each of the areas in which the government contended that anti-competitive effects might arise was considered separately. The thoroughness of this study is indicated by the areas considered:

(a) Prior acquisitions (App. 42a).

(b) Intention of the parties (App. 44a).

(c) Likelihood of suppression of product lines (App. 45a).

(d) Elimination of competition (App. 45a, 55a, 62a).

(e) Weakening of either company in their respective lines (App. 45a).

(f) Advantages resulting from the acquisition (App. 46a, 54a, 61-62a).

(g) Concentration in the respective industries (App. 47a).

(h) Changes in market position (App. 48a).

(i) Effects on competitors (App. 49a).

(j) Ease of entry into industries involved (App. 55a, 58a).

(k) Tendency toward monopoly (App. 57-58a).

This careful inquiry yielded nothing to show a reasonable probability that the acquisition would have the prohibited anti-competitive effects. There was a total failure of proof that this interindustry merger was likely to adversely affect competition in either industry or in any other line of commerce claimed by the government.

The Government's Statistics

Although the government deprecates reliance on statistics, it uses a great many of them in its Jurisdictional Statement in an attempt to show what Continental's and Hazel-Atlas' positions would have been if metal cans and glass containers or metal cans and glass containers for foods or for canning could have been combined into a single product market.

Its statistical methodology is such, however, that each figure it uses must be examined with care. The record shows that they are false. The district court found that many of the government's statistical combinations "have no sound statistical basis and are predicated on implausible hypotheses not supported by evidence." (App. 48a). The government does not contest this finding; it tries to ignore it.

It is never easy to demonstrate the falsity of statistics, but the record in this case is such as to permit it to be done.

In the first place, the metal can and glass container industries are so different that they do not use a common system of statistical notation. The can industry reports to the Census Bureau in terms of the amount of tinplate consumed; the glass industry in terms of units, by end

use categories, shipped. At the trial the government witness presenting its statistics testified that he had never heard of combined figures (Tr. 2941). He had set about to make his own combinations.[12]

In an attempt to convert the tinplate use to units of metal cans, the government took a series of figures from the can industry's trade association which were clearly marked as the hypothetical number of cans which could have been made from the amount of tinplate consumed. These figures were never used by the trade association without being clearly marked as hypothetical. They were admittedly made without regard to product mix, which the record shows varies greatly from company to company, and by making certain undisclosed assumptions with respect to size of cans and weight of tinplate used in making metal cans (Tr. 2931-38, GX 800).

From the trade association's hypothetical figure the government computed an assumed conversion factor (one never used by the trade association—Tr. 2989) which it applied to the Census Bureau figures of total tinplate consumed in the making of cans of all sizes and shapes. No attempt was made to allow for variations in sizes of cans, which obviously vary widely.

Using the method described, with its clearly erroneous assumptions, the government then had a figure which it called the total number of units of cans manufactured. To this it added the total number of units of glass containers shipped, counting each unit as one although the record shows that great numbers of the glass containers were returnable bottles used on an average of twenty-two times each (Tr. 2363). The Census Bureau has, for obvious reasons, always carefully separated returnable from non-returnable bottles (Tr. 2944). The largest category of

[12] He was not a qualified statistician (Tr. 2849-51).

returnable bottles is beer bottles. Since Hazel-Atlas' production of beer bottles was negligible, the distortion was extremely large.

To this artificially constructed universe figure the government applied Continental's usage of tinplate, similarly converted into hypothetical units, and Hazel-Atlas' production of units of glass containers, to get a percentage of the total. This percentage was carried out beyond the decimal point to give an appearance of exactitude.

The percentage figures have no relationship to reality. They are false.

At the trial the government attempted to construct figures showing Continental's and Hazel-Atlas' share of containers used in "food canning." It now recognizes that it failed in this (J. S. 23), but it proposes a totally unfounded assumption that the proportion would be the same as the proportion of the whole. Even if the stated proportion of the whole were reliable, which it clearly is not,[13] this assumption would be untenable for the product mix of each of the two companies was entirely different from the rest of their respective industries.

Finally, the government, recognizing the weakness of its statistics, says that in any event they can be relied upon for "the accuracy of the broad picture presented" (J. S. 23). They cannot be relied on for any picture, broad or narrow, because they are based on inherently unsupportable assumptions.

In any event, the district court admitted these statistics in evidence, accorded them every possible weight, and properly concluded that there was no showing, statistical or otherwise, of the forbidden anti-competitive effects in any line of commerce.

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[13] To get this proportion, the government relies on the pseudo "GX 636" (J. S. 23).

Conclusion.

In an extremely conscientious examination of the law and the facts the district court found that there had been a failure to prove any violation of Section 7. The appeal presents no questions of law for this Court's review. The government would have this Court examine *de novo* a large record compiled in a lengthy pre-trial and trial, and make new findings in place of those made by the trier of facts, who spent large amounts of time over a period of several years in their preparation. Under Rule 52(a) those findings cannot be set aside unless they are clearly erroneous. No such showing has even been attempted, much less made, here. This is a fact case pure and simple. The appeal should be dismissed for the reasons stated above or the judgment of the district court should be affirmed without further briefs or oral argument.

Respectfully submitted,

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September 11, 1963

Appellee's Appendix 1.

(Exhibit DX-N)

Ammonia	All or substantially all in glass.
Antiseptics	All or substantially all in glass in consumer size.
Baby Foods	80% glass; 20% cans.
Beer and ale	39% cans; 6½% non-returnable glass; balance returnable glass.
Brilliantines	All or substantially all in glass in liquid form and some collapsible tubes with different formulation.
Catsup	All or substantially all in glass in consumer size—Institutional all or substantially all in cans—plastic film or containers for individual servings—very small.
Cheese spreads	90% glass; balance aluminum tumblers, plastic tubes and film, collapsible metal tubes, foil, crocks and paper; no cans.
Chili sauce	All or substantially all in glass.
Cider	All or substantially all in glass.
Citrus segments, chilled	All or substantially all in glass.
Citrus segments, non-refrigerated	95-100% cans.
Coffee, ground	Less than 1% in glass; balance in cans and paper bags.
Coffee, soluble	99% glass; 1% cans.
Cologne	95-100% glass — some aerosols of glass, metal and plastic.
Corn	All or substantially all in cans.
Corned beef hash	95% cans.
Cosmetic creams	90% glass; 5% plastic; 5% collapsible tubes.
Crabmeat	All or substantially all in cans.
Cranberry sauce	All or substantially all in cans.
Cream, whole	50% glass; 50% paper—no cans.

Cured ham	All or substantially all in cans.
Distilled spirits	All or substantially all in glass.
Drugs, ethical in liquid form	All or substantially all in glass.
Flavoring extracts	All or substantially all in glass.
Food sauces other than tomato sauce	All or substantially all in glass.
Fruit spreads and preserves	More than 95% in glass for home consumption.
Green beans	95% cans; 5% glass.
Hair lacquer	All or substantially all in metal.
Hair tonic	More than 95% in glass.
Hominy	All or substantially all in cans.
Horse radish	All or substantially all in glass.
Juices, concentrated and frozen	All or substantially all in cans.
Lard	All or substantially all in cans; a little paper.
Lighter fluid	90% cans—10% glass.
Lima beans	All or substantially all in cans.
Liquid bleach	All or substantially all in glass.
Liquid shoe polish	All or substantially all in glass.
Lubricating grease	All or substantially all in cans.
Luncheon meat	All or substantially all in cans.
Machine oil	Substantially all in cans.
Marachino cherries	All or substantially all in glass in consumer size.
Mayonnaise	All or substantially all in glass in consumer size.
Milk, whole	55% paper—45% glass.
Mineral oil	All or substantially all in glass.
Motor oil	All or substantially all in cans.
Mouth wash	All or substantially all in glass.
Mustard, prepared (consumer size)	95% glass—5% plastics.

[illegible]sh	All or substantially all in glass.
Nail polish remover	All or substantially all in glass.
Olives, green	All or substantially all in glass.
Olives, ripe	90-95% cans; balance glass.
Paint, oil base (household, interior and exterior)	None in glass.
Paint, polyvinyl acetate base (household, interior and exterior)	None in glass.
Paint, rubber base (household, interior and exterior)	None in glass.
Paste shoe polish	All or substantially all in cans.
Peaches	95% cans—5% glass.
Peanut butter (consumer size)	90% glass—5% plastic and 5% cans.
Pears	95% cans—5% glass.
Peas	All or substantially all in cans.
Perfume	All or substantially all in glass.
Pickles	Over 95% glass for household use—balance between cans and plastic film.
Pineapple	All or substantially all in cans.
Proprietary medicine in liquid form	95% glass—5% plastics.
Prune juice	All or substantially all in glass.
Pumpkin	All or substantially all in cans.
Relish (consumer size)	All or substantially all in glass.
Salad and cooking oils (consumer size)	85% glass; 15% cans.
Salad dressings	100% glass for retail.
Salmon	All or substantially all in cans.
Sardines	All or substantially all in cans.
Single strength blended orange and grapefruit juice	Over 95% cans.
Single strength grape fruit juice	90-95% cans; balance glass.

Soft drinks	98½% glass; balance cans (1% is one way bottle).
Solid and semi-solid shortening	All or substantially all in cans.
Soup (Liquid form)	All or substantially all in cans.
Squash	All or substantially all in cans.
Starch (Liquid form)	All or substantially all in glass.
Sweet Potatoes	All or substantially all in cans.
Syrup, chocolate	95% cans—5% glass.
Toilet water	All or substantially all in glass.
Tomato juice	Over 95% in cans.
Tomato paste	All or substantially all in cans.
Tomato puree	All or substantially all in cans.
Tomato sauce	All or substantially all in cans.
Tomatoes, stewed	All or substantially all in cans.
Tomatoes, whole	All or substantially all in cans.
Tuna fish	All or substantially all in cans.
Vinegar	All or substantially all in glass consumer size.
Wax beans	Over 95% cans—balance glass.
Wet pack pet foods	90-95% cans; balance glass.
Wine	All or substantially all in glass.
Writing ink	All or substantially all in glass except refill cartridges.

Appellee's Appendix 2.

(Stipulation—Tr. 2697-2701).

The plaintiff stipulates that if the remaining FBI witnesses which it will call to testify were cross-examined with respect to the following matters each of them would answer substantially as follows:

That he had never been employed by a can manufacturer, a glass container manufacturer, a plastic container manufacturer or a firm engaged in conducting surveys or polls of public opinions or consumer preference, and that he is not experienced in the techniques of such polls or surveys;

That he has never been employed by a packer who uses any of the kinds of containers that he observed during the course of his assignment;

That he has not been in communication with any of the packers whose products he has stated that he observed;

That he is not a chemist;

That he does not know the difference between high-density and low-density polyethylene, nor the difference between either of them and polystyrene;

That he took no note of and made no list of products in the stores which he visited which were packed in only one type of container;

That he took no note of and made no record of prices of the products which he observed;

That he took no note of and made no record of the quantities of products in the containers he observed;

That he took no note of and made no record of the quality of the products in the containers he observed;

That he took no note of and made no record of the differences in the preparation of the products in the containers he observed;

That he could not say whether the products which he observed were specially packed for special purposes, such as, for example, dietetic purposes;

That he did not know whether any of the products which he observed were processed by heat sterilization;

That he made no observation as to the amount of shelf space devoted to the different types of containers used to package what he considered to be similar products;

That he has no information as to the quantities of any of the products which he observed in inventory in any store, or as to the quantities sold in any store in any period of time, or as to the quantities sold in the metropolitan area of the community in which the observations were made, or as to the quantities sold in the United States at any time;

That he has no information with respect to the formulation of any of the products which he observed to be packaged in cans or glass or plastic;

That he did not notice whether any of the products which he observed were packaged locally or at a distance;

That he could not tell from the package of any article which he observed whether or not it was being test-marketed, or whether or not it was obsolete stock, or whether or not it had been packed as an experiment, or whether or not it was on special sale on the date of the observation;

That he couldn't tell from the package of any article which he observed whether or not the packager who packaged it is still packing in the same type of container;

That he could not tell from the package of the products that he observed or from any other source why the packer chose the particular type of package for the product;

That in the case of stores whose principal business is the sale of foods, he noticed that they carried fresh fruits and vegetables, fresh meats and fresh dairy products, that they carried frozen foods and foods in dried or dehydrated forms, but that he made no particular observations as to what the particular products were;

That he has no information as to the method of processing the various products he observed and no information as to the method of filling the containers he observed.